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IN THE

Supreme Court of the United States

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FILED
JUN 9 1970
JOHN F. DAVIS, CLERK

October Term, [redacted] 1970

No. [redacted] 167

EXTON DRIVE-IN, INC., *Petitioner*

v.

THE HOME INDEMNITY CO. and W. ARNOLD BLYTHE, Individually and t/a BLYTHE CONTRACTORS, *Respondents*

Brief on Behalf of W. Arnold Blythe, Individually and Trading as Blythe Contractors, One of the Respondents, in Opposition to Petition for Writ of Certiorari

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IN THE

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No. 1586

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Brief on Behalf of W. Arnold Blythe, Individually and Trading as Blythe Contractors, One of the Respondents, in Opposition to Petition for Writ of Certiorari

JURISDICTION

Petitioner improperly attempts to invoke the jurisdiction of the Supreme Court of the United States, having failed to raise the Fourteenth Amendment to the Federal Constitution as warranting a new trial because of the trial court's delay in rendering a decision.

QUESTION PRESENTED

Whether the United States Supreme Court should grant a Writ of Certiorari to a corporate litigant because of the Court's delay in rendering a decision in a case tried by a judge without jury, where Petitioner made no effort to urge or compel the court to make a decision and where the grant of a new trial would further delay the end of the litigation.

ARGUMENT

Respondent respectfully argues that this case is not one for the grant of a Writ or Certiorari. Until now, Petitioner has failed to raise a Federal question and even now wishes to have this illustrious Court review the decision of the Supreme Court of the Commonwealth of Pennsylvania in light of the Pennsylvania Constitution. As was stated by Chief Justice Vinson, before the American Bar Association, September 7, 1949:

> "The Supreme Court is not, and never has been primarily concerned with the correction of errors in the lower court decisions . . . The function of the Supreme Court is, therefore, to resolve a conflict of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws and treaties of the United States, and to exercise supervisory power over lower federal courts."

The Supreme Court does "not reach for constitutional questions not raised by the parties." *Mazer v. Stein*, 347 U.S. 201.

The decision of the State Supreme Court points out that the case delayed as it was, is unique. It is not something that occurs regularly in the courts of the State. It was unusual and one ventures to say that the decision will have strong effect on the conduct of other judges in delaying decisions. Very few litigants would be affected by this decision. Furthermore, is it not manifest that further injustice would result if a new trial were to be granted? It would further postpone the ends of justice.

It is pointed out, in Petitioner's Brief, that there is a procedure that must be followed for the pursuit of trials without a jury and the reporting procedure. All this appears in Appendix A of the Petition for Writ of Certiorari and is, therefore, not repeated. Certainly, it

should have been followed and undoubtedly will be in the future based on the criticism heaped upon the trial judge. However, we submit it does not warrant the extraordinary remedy of certiorari.

Although Petitioner belatedly complained of the delay, it did nothing to speed the Court's decision, yet this is exactly what this Respondent did without assistance by the mandamus action. Furthermore, although decrying delay as a denial of due process, the Petition for Writ of Certiorari to the Supreme Court of the United States was not perfected until the ninetieth day. It comes with poor grace for such a litigant to complain that its rights were violated and that it has been denied due process by delay. It was no more denied due process than the respondent.

Petitioner complains of "massive backlogs" yet seeks to keep this case as one of that ever growing mass. This has been its philosophy from the very beginning.

Singer v. Oil City Redevelopment, 437 Pa. 55 did not have to consider the question being raised by the Petitioner so it does not require the Pennsylvania Act of April 22, 1874 to be considered as mandatory on the question of delay and Petitioner itself points out that on the time taken for decisions it has been interpreted as directory. Thus, it was said In Re: *Griffiths Estate*, 57 A.2d 893, 897 (1948):

> "Irrespective of what may be the proper construction of this section, we believe that this provision is directory only. Otherwise, all the time consumed in the trial of the case would be for naught by reason of a failure to file the decision within sixty days from the termination of the trial irrespective of the cause for delay. Such certainly was never the intention of the legislature."

Further objection to the exercise of jurisdiction by the Supreme Court can be found within the framework of the Fourteenth Amendment itself as applicable to "citi-

zens". For this purpose it is clear that a corporate litigant is not a citizen for the purpose of invoking jurisdiction.

> "Citizens of the United States within the meaning of this article must be natural and not artificial persons; a corporate body is not a citizen of the United States." *Insurance Co. v. New Orleans*, 13 Fed. Cas. 67 (No. 7052) (C.D.D. La 1870).

Not being citizens of the United States, corporations accordingly have been declared unable to claim the protection of that clause of the Fourteenth Amendment which secures the privileges and immunities of citizens of the United States against abridgment or impairment by the law of a State. *Orient Insurance Co. v. Daggs*, 172 U.S. 557, 561 (1899). This conclusion was in harmony with the earlier holding in *Paul v. Virginia*, 8 Wall 168 (1869) to the effect that corporations were not within the scope of the privileges and immunities clause of State citizenship set out in Article IV, Section 2. *Selover Bates & Co. v. Walsh*, 226 U.S. 112, 126 (1912). *Berea College v. Kentucky*, 211 U.S. 45 (1908). *Liberty Warehouse Co. v. Tobacco Growers*, 276 U.S. 7189 (1928). *Georgia v. American Press Co.*, 297 U.S. 233 (1936).

A corporation is not a citizen within the meaning of the privilege and immunities clause of the Fourteenth Amendment. Although it may have standing to sue on the basis that there has been unlawful discrimination against it through denial of equal protection, Petitioner can point to no act of the State which had such an effect. *D.D.B. Realty Corp. v. Merrill*, 232 F. Supp. 629.

Admittedly, a corporation may not be denied its property without due process of law, we submit that a delay not of the choosing of the parties and apparently acquiesced in by the conduct of the Petitioner is not such a denial as should cause this Learned and Honorable Court to grant a Writ of Certiorari.

Although delay has been an important factor in granting relief in criminal cases, it has not been so applied in civil actions. *Smith v. Hovey*, 393 U.S. 374. We believe that corporate Petitioner should do more than state that it has been deprived of the guaranties of the Fourteenth Amendment but should point to the prejudice suffered by the delay apart from prejudice that was suffered by all the litigants. When one considers that due process is a two-edged sword one realizes that to grant the new trial would further deny due process by further prolonging the litigation.

The State Supreme Court stated it as follows:

> "Our unhappiness with this delay is not, however, a sufficient ground for ordering a new trial for such an order would still further defer the end to this litigation. If the facts of this case support the decision as rendered, we would compound the injustice by requiring the parties to return to their pre-1960 position and begin anew the trial of this case."

CONCLUSION

This case is not one for the grant of a Writ of Certiorari. This is a corporation that had not raised any Federal Question before any of the courts of the State. It demonstrates no violation of substantive rights guaranteed under the Fourteenth Amendment other than delay in and of itself. This delay was suffered by all the parties, not this one alone.

The situation is not one that is repeated in the state and therefore, requires that action be taken to stop it forthwith. This is already being done by the state. Only the respondent herein attempted without cooperation to have the delay terminated. He should be the last to be penalized. The one that should least complain should be this Petitioner on constitutional grounds or otherwise.

Respectfully submitted,

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Respondents.

BRIEF ON BEHALF OF THE HOME INDEMNITY CO., ONE OF THE RESPONDENTS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 1586

EXTON DRIVE-IN, INC.,

Petitioner,

v.

THE HOME INDEMNITY CO. AND W. ARNOLD BLYTHE, INDIVIDUALLY AND T/A BLYTHE CONTRACTORS,

Respondents.

BRIEF ON BEHALF OF THE HOME INDEMNITY CO., ONE OF THE RESPONDENTS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JURISDICTION.

Petitioner improperly attempts to invoke the jurisdiction of the Supreme Court of the United States, having failed to raise the Fourteenth Amendment to the Federal Constitution as warranting a new trial because of the trial court's delay in rendering a decision.

QUESTION PRESENTED.

Whether the United States Supreme Court should grant a Writ of Certiorari to a corporate litigant because of the Court's delay in rendering a decision in a case tried by a judge without jury, where Petitioner made no effort to urge or compel the court to make a decision and where the grant of a new trial would further delay the end of litigation.

ARGUMENT.

The Brief filed on behalf of Respondent W. Arnold Blythe has so well set forth the legal lack of merit of the position taken by Petitioner, as to require no repetition. The sole issue presented in this case at the time of trial and on appeal was factual and the question of undue delay here raised by Petitioner is not one which comes within the jurisdiction of this honorable Court.

It is interesting to note that Exton Drive-In, Inc. instituted its action against this Respondent, as Surety for Blythe, at a time when Blythe's contract had been substantially completed and Exton Drive-In, Inc. had taken possession of the building site and was operating it as an outdoor movie. At that Exton owed Blythe a balance of $13,000.00 on the contract which is still due and unpaid. Even after the start of litigation Blythe came in and for a period of about a year did corrective work. At the trial, some four years after Exton commenced and continued business, it was developed that no work was done nor money expended by Exton for the repair or upkeep of the work of Blythe. It clearly appears that in this protracted litigation Blythe and Blythe alone suffered as a result of the delay. It comes with poor grace for Exton to now complain of delay and to ask this honorable Court to further delay the termination of this litigation.

As stated by Justice Pomeroy of the Pennsylvania Supreme Court in his majority opinion (p. 13 of Petition):

> "Nothing in the record indicates that any party was responsible for this delay; the fault appears to be that of the trial Judge."
>
> * * *
>
> "Our unhappiness with this delay is not, however, a sufficient ground for ordering a new trial for such an order would still further defer the end of this litigation.

If the facts of this case support the decision as rendered, we would further compound the injustice by requiring the parties to return to their pre-1960 positions and begin anew the trial of this case. Accordingly, we hold that the lower court's failure to grant a new trial solely because of the long delayed decision was not an abuse of discretion."

CONCLUSION.

Since Petitioner has failed to show any basis for Jurisdiction on the part of your honorable Court and since the delay complained of was suffered by all parties to the litigation without fault, the Petition for Writ of Certiorari should be dismissed.

Respectfully submitted,

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